SYARIKAT DESA PERMAI SDN. BHD.

v.

MELOR SCREENVISION (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-865-92]
27 MAY 1993

CONTRACT: Formation - Sale and purchase of property - Plaintiff's offer accepted by defendant by paying 10% of agreed sale price through dishonoured cheque - Whether a binding and enforceable agreement concluded - Whether defendant in breach for failing to continue with the agreement.

This was an application for summary judgment by the plaintiff for RM136,736, being damages for breach of contract for which the defendant was alleged to be liable.

The plaintiff was the developer of a complex known as Puteri Plaza Park to be built in Ampang, State of Selangor. In January 1992 the defendant intimated to the plaintiff that they intended to buy two lots in the said complex for the purpose of running a cinema for RM1,367,360 and consequently signed and accepted the relevant letter of offer submitted to them by the plaintiff. Subsequently, pursuant to a series of discussions and correspondence between them, the plaintiff's solicitors forwarded a copy of the agreed sale and purchase agreement to the defendant's solicitors for signing by the defendant. The defendant's solicitors, however, returned the said agreement to be signed by the plaintiff first and also enclosed a cheque for RM136,736 which was 10% of the purchase price. This cheque was later dishonoured.

In the meantime on 9 April 1992, the plaintiff's solicitors, after obtaining the plaintiff's signature, forwarded the agreement back to the defendant's solicitors. On 14 April 1992 after knowing of the dishonour, the plaintiff's solicitors informed the defendant's solicitors that the agreement was terminated by way of default as the defendant had not complied with the conditions of the offer and claimed the aforesaid sum for breach of the agreement.

The issue was whether on the facts and in the circumstances of this case, despite the non-signing of the sale and purchase agreement by the defendant, a legally binding and enforceable agreement had been concluded by the parties.

Held:

On the facts a contract had been concluded between the parties even though the written agreement had yet to be signed by the defendant. The acceptance by the defendant of the plaintiff's letter of offer had resulted in a legally binding and enforceable contract between the parties and the payment of the 10% by the defendant on 3 April 1992 had only strengthened this fact. The defendant was therefore liable for the breach by failing to continue with the agreement.

[Application granted].

Cases referred to:

Alexander Brogden And Others v. The Directors, &c., of the Metropolitan Railway Company [1877] H.L.[E] 666 ***(refd)***

Port Sudan Cotton Co. v. Govindswami Chettiar & Sons [1977] 2 Lloyd's LR 5 Diamond Peak Sdn. Bhd. & Anor. v. Tweedie [1980] 2 MLJ 31 ***(refd)***

Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] 2 MLJ 31 ***(refd)***

Ace King Pte. Ltd. v. Circus Americano Ltd. & Ors. [1985] 2 MLJ 75 ***(refd)***

Other sources referred to:

Chitty on Contracts, pp. 33 & 34

For the plaintiff-H.M.Chow; M/s. Abdullah Ooi & Chan

For the defendant-C.H.Cheng; M/s. Cheng & Co.

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

This is an application for summary judgement by the plaintiff against the defendant by summons in chambers filed on 21 September 1992 for RM 136, 736 with interest at eight per cent per annum from the date of judgment until final realization, for interlocutory judgment on the damages to be assessed and for costs.

As pleaded in their statement of claim filed on 20 June 1992, the plaintiff at the material time was the developer of a complex to be known as "Puteri Park Plaza" to be built on a piece of land held under H.S. (M) 16493, P.T. No.12979, Mukim Ampang, Daerah Ulu Langat in the State of Selangor. In January 1992, the defendant had communicated with the plaintiff to buy two lots in the said complex for the purpose of running a cinema for RM1,367,360.

After a series of discussions and exchange of correspondence between solicitors for both parties on the matter, the solicitors for the plaintiff had forwarded a copy of the relevant sale and purchase agreement to the solicitors for the defendant on 3 April 1992 to be signed by the defendant. By letter also dated 3 April 1992, the defendant's solicitors had returned the said agreement, so that it would be signed by the plaintiff first, but had also enclosed a cheque dated 3 April 1992 for RM136,736 which was ten per cent of the sale and purchase price. The said cheque was, however, later dishonoured. In the meantime, before knowing of the dishonour, the plaintiff's solicitors had again forwarded the said agreement, after having it signed by the plaintiff, to the defendant's solicitors on 9 April 1992. On 14 April 1992, after knowing of the dishonour, the plaintiff's solicitors had informed the defendant's solicitors that the said agreement had been terminated as the defendants had not complied with the conditions of the plaintiff's offer dated 13 January 1992. In the event, the plaintiff had claimed for the RM136,736, damages to be assessed, interest at the rate of eight percent per annum on the judgement debt from the date of judgment to the date of realisation, costs and further or other relief.

Apart from the reliance on the statement of claim, the plaintiff in their supporting affidavit had provided further details of the transaction and had annexed the relevant letter of offer dated 13 January 1992, which had been signed by both parties, and their solicitors' undated letter to the defendant's solicitors enclosing the relevant sale and purchase agreement with the defendant's solicitors acknowledgement of receipt dated 3 April 1992. The solicitors for the defendant's letter also dated 3 April 1992, enclosing a cheque for RM136,736 and acknowledged by the plaintiff's solicitors on the same date, had also been exhibited. Unaware that payment had been stopped on the cheque, the plaintiff's solicitors had sent another undated letter similar to their earlier undated letter enclosing the relevant sale and purchase agreement, the only difference being that this letter had stated that the said agreement had been duly signed by the plaintiff. This particular letter has the defendant's solicitors' acknowledgement of receipt dated 9 April 1992.

It is pertinent to observe at this juncture that the plaintiff's solicitors' two undated letters acknowledged by the defendant's solicitors on 3 April 1992 and 9 April 1992 and the defendant's solicitors' letter dated 3 April 1992 acknowledged by the plaintiff's solicitors on the same day must have been sent on the same date as the acknowledgements as both the plaintiff's and the defendant's solicitors were having firms on different floors in the same building. In between the letter of offer dated 13 January 1992 and the undated letter from the plaintiff's solicitors enclosing the sale and purchase agreement and acknowledged by the defendant's solicitors on 3 April 1992, there had been an exchange of letters between the parties as regards some of the terms to be included in the agreement. Subsequently, being made aware of the cheque's dishonour which amounted to default on the defendant's part as regards the plaintiff's letter of offer dated 13 January 1992, the plaintiff's solicitors had sent the defendant's solicitors a letter dated 14 April 1992 giving notice that the plaintiff's offer for the sale of the property had lapsed. Learned Counsel for the plaintiff had submitted that the position would have been the same even if the defendant's solicitors had not sent the ten per cent deposit when returning the agreement to be signed by the plaintiff first.

Learned Counsel for the defendant had agreed that it was clear from the documents produced that the offer had lapsed as the defendant had not compiled with the conditions. As such, he reiterated that the contract had never been in existence. As for the cheque, his submission was that there had been no consideration as it would not have been drawn for payment before the sale and purchase agreement was entered. Consequently, his contention was that there were triable issues to be decided at the trial.

Where the appellant in *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] 2 MLJ 39 had refused to complete the agreement and the respondent had applied for specific performance, the Federal Court had held that on the evidence and the exhibits in that case, it was the intention of the parties to come to a definite and compelte agreement on the subject of the sale and the mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement between them. They had accordingly ruled that a legally binding and enforceable agreement had been concluded and the learned Judge had not erred either in law or fact in arriving at the finding that he did.

In *Ace King Pte. Ltd.v.Circus Americano Ltd. & Ors*. [1985] 2 MLJ 75, it was decided that from the evidence the parties had concluded their negotiations and an agreement had been reached on the same terms and conditions of the contract. The only thing that had not been done was the signing of the contract which had been prepared by the lawyer. In the circumstances, the Court was of the view that the contract had been concluded between the plaintiffs and the defendants.

In **Chitty on Contracts** at pp. 33 and 34 it is stated that:

> An acceptance is a final and unqualified expression of assent to the terms of an offer..... Negotiations with a view to contracting may be long and complicated; and in such cases it may be hard to tell when if at all an offer has been made and accepted. The Court then has to look at whole course of the negotiations and to determine at what point of any the parties reached agreement. The parties may of course continue their negotiations after this point has been reached; but this fact will not affect the existence of the contract between them unless the continuing negotiations can be regarded as an agreement to rescind the original contract ... Where an offer or an acceptance or both are alleged to have been made by conduct, the terms of the agreement are obviously more difficult to ascertain than where the agreement was negotiated by express words. The difficulty may be so great as to force the court to conclude that no agreement was reached at all. But sometimes the Court can resolve the uncertainty by applying the standard of resonableness or by reference to another contract between the parties, or even to a draft agreement between them which had never matured into a contract.

On the facts and the authorities cited before me, it was my view that a contract had been concluded between the parties even though the written agreement had yet to be signed by the defendant. The acceptance by the defendant of the plaintiff's letter of offer dated 13 January 1992 had resulted in a legally binding and enforceable contract between the parties and the payment of ten per cent by the defendant on 3 April 1992 had in fact strengthened this fact. As such, it was my finding that the defendant was liable for the breach by failing to continue with the agreement. I had therefore granted the orders as prayed by the plaintiff.

SYARIKAT PERIKANAN HING LEE (SABAH) SDN. BHD.

v.

ANSARI ABDULLAH (PRACTISING UNDER THE NAME AND STYLE OF ANSARI & CO.)

HIGH COURT BORNEO, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K.1680 OF 1986]
2 APRIL 1993

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out defence - Defendant appointed by plaintiffs as solicitors - Plaintiffs alleging breach of contract upon a retainer and/or negligence as stakeholder - Defendant denying retainer and solicitor-client relationship - Whether any merit in the defence.

LEGAL PROFESSION: Solicitor and client - Plaintiffs lending money to borrower on security of land titles - Defendant retained by plaintiffs as solicitors - Defendant to hold loan as stakeholder - Defendant releasing loan to borrower without ensuring registration of charges on titles - Plaintiffs alleging breach of contract upon retainer and/or negligence as stakeholder - Defendant denying existence of solicitor-client relationship - Whether any relationship existed - Whether there was a retainer.

TORT: Professional negligence - Defendant retained as solicitors - Defendant to hold loan from plaintiffs to borrower as stakeholder - Defendant to register charges on titles of land provided by borrower as security for the loan - Defendant releasing loan without registering charges - Whether defendant breached duty of care.

This was an application by the plaintiffs to strike out the defendant's defence under O. 18 r. 19 of the Rules of the High Court 1980 (RHC) or under the inherent jurisdiction of the Court.

The plaintiffs, licenced moneylenders, extended a loan to the borrower on the security of the borrower's lands which was to be charged in favour of the plaintiffs. By letter dated 15 December 1983 the plaintiffs instructed the defendant, a firm of solicitors, to process the necessary documents and to release the loan only upon full satisfaction that the loan was secured. The defendant and one Chew Tee Wah was also to sign a letter of guarantee. The loan of RM300,000 was subsequently received by the defendant as stakeholder and released to the borrower but upon a land search being conducted it was revealed that no charges had been